

Lord Kennet. Reporter
JUNE 15, 1770.

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INFORMATION

FOR

EDWARD TYSON, Merchant in *London*, Executor of the deceased JOHN WATSON, Merchant there, and JAMES SETON, Merchant in *Edinburgh*, his Attorney, Pursuers,

AGAINST

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S

WALTER SCOTT, Writer to the Signet, and others, Defenders.

JOHN WATSON, Merchant in *London*, now deceased, had Dealings to a great Extent, with Messieurs *Dunbar, Young and Simpson*, Merchants in *Sundbury in Georgia, North America*, whereby a very large Balance became due to him by these Gentlemen, amounting, at Mr. *Watson's* Death in 1768, to about 7842 l. *Sterling*.

Of this Date, the Pursuers, as in Right of Mr. *Watson*, obtained July 13th, Decreet before your Lordships against *Thomas Young and John Simpson* 1769, two of the Partners of said House, for Payment of the above mentioned Debt, and they are now endeavouring to make it effectual against an Estate, to which *Simpson*, some time ago, succeeded by the Death of his Uncle, Mr. *Thomas Cockburn*, Writer in *Edinburgh*. In doing this, they are opposed by Mr. *Walter Scott*, Writer to the Signet, and others, as pretended Trustees and Heirs, under a Death-bed Settlement, executed by Mr. *Cockburn*, which gives occasion to the present Question, to be reported to your Lordships by Lord *Kennet*, Ordinary. The Particulars giving Rise to the Question are these:

The said *Thomas Cockburn*, Writer in *Edinburgh*, died in November 1765, leaving a considerable Succession, chiefly in Heritage, to which, as he had no Children, his Nephew, the above mentioned *John Simpson*, fell in the Course of Law to succeed.

A

Mr.

Nov. 4th,
1765.

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Mr. Cockburn, of this Date, when within sixty Days of his Death, and labouring under a severe Indisposition, of which he died, executed a very whimsical Settlement, whereby he " gave, " granted, and disposed, to, and in favour of *Walter Scott*, Writer to the Signet; whom failing, by Death, or Non-acceptance, to " *John Hay*, Writer in *Edinburgh*, and to the Assignee of the Survivor of either of them who should accept thereof, in Trust, for " the Uses and Purposes," therein specified, all and sundry Lands, and other heritable Subjects belonging to him at his Death, and likewise all and sundry heritable and moveable Debts, Sums of Money, Rents of Lands, and other Moveables whatsoever; but always with and under the Burdens, Provisions, and Declarations after mentioned, viz. in the first place, with the Burden of his Debts and funeral Charges. 2dly, Of certain Provisions to his Wife. 3dly, Certain Legacies and Gifts. 4thly, With this Provision, " That, if *John Simpson*, my Nephew, Merchant in *South Carolina*, or his Heirs, shall ratify and approve of this present Trust-right, by a Deed under their Hand, then, and in that Case, I " hereby appoint the acting Trustee for the Time, to discharge " and give up in favours of him or them, all Bonds, Bills, and " other Documents of Debt, due by them to me at the Time of " my Death."

Then follow the Uses and Purposes, in these Words: " And I " hereby appoint and ordain the acting Trustee for the Time, to " make Payment of the Rents and yearly Profits of my said heritable Estate, (if any shall remain, after deducing the Annuity " before mentioned, payable to my said Wife,) to the said *John Simpson*, my Nephew; whom failing, to the Heirs-male of his " Body; whom failing, to the Heirs-male of the Body of the said " *Elizabeth Simpson*, his eldest Sister; whom failing, to the Heirs-male of the Body of the said *Agnes Simpson*, his youngest Sister; " whom failing, to the said Sir *James Cockburn*, Baronet, and the " Heirs-male of his Body; whom all failing, I appoint my whole " Estate, both heritable and moveable, to belong to my nearest " and lawful Heirs and Assignees whatsoever, to whom I hereby " dispoise and convey the same, and in whose favour I ordain the " acting Trustee for the Time to divest himself thereof according- " ly, declaring that this present Trust-right shall from thenceforth " expire, and be at an end."

" And,



“ And, further, I ordain the said acting Trustee for the Time,
 “ to uplift and receive, and ware out and employ, the Residue of
 “ my *moveable Estate*, (after Deduction of my funeral Charges,
 “ Debts and Legacies,) *in purchasing Land*, or upon sufficient he-
 “ ritable Security, and to take the Rights and Infeftments thereof,
 “ to him, the said acting Trustee, and his Assignees, in Trust,
 “ and to make Payment of the said Rents, or yearly Profits there-
 “ of, to the said *John Simpson*; whom failing, to the other Heirs
 “ and Substitutes before specified, in the Order before described,
 “ but always with the Burden of the foresaid Liferent-annuity,
 “ payable to my said Wife; declaring hereby, that it shall not be
 “ lawful to the said *John Simpson*, or the other Heirs and Substi-
 “ tutes before mentioned, to burden or affect my heritable or
 “ moveable Estate, before dispoſed, further than to the Extent of
 “ the annual Profits thereof, during their respective Lifetimes, and
 “ that no Debts or Deeds, done or to be done by him or them,
 “ shall burden or affect the Fee or Property of the said heritable or
 “ moveable Subjects, but the same shall remain free of any such
 “ Incumbrances, until the Expiration of this present Trust.”

“ And to the end, there may be a *Succession of Trustees* for ma-
 “ naging this Trust, until the Expiry thereof, thereby give full
 “ Power to the said *Walter Scott*, whom failing, by Decease, or
 “ Non-acceptance, to the said *John Hay*, and the Survivor of
 “ them, to substitute and appoint one or more Person or Persons,
 “ one after another, as Assignees to the foresaid Trust-right, with
 “ the whole Powers, Faculties, and Burdens, before and after ex-
 “ pressed, and which Persons so to be named, shall in the same
 “ Manner have Power to substitute other Assignees, failing of them-
 “ selves, for executing the whole Purposes of this present Trust,
 “ who shall again have Power to name other Successors or Assign-
 “ nees, and so on, with full Power to the acting Trustee for the
 “ Time, to name or appoint Successors or Assignees in this present
 “ Trust, for executing the whole Purposes of the said Trust, ay
 “ and until the Event before expressed, at which the same is decla-
 “ red to expire, providing always, that the Disposition or Assign-
 “ nations to be granted by the acting Trustee for the Time, in fa-
 “ vour of his Assignees or Successors in Office of Trustee, and the
 “ Infeftments to follow thereon, shall contain the whole Uses and
 “ Purposes, Burdens and Conditions, herein expressed.” Then
 follows

follows a Power to the Trustees to appoint Factors, &c. and a Reservation to himself to alter and innovate at any Time of his Life.

Of the same Date, he executed a Testament and Nomination of Executors in a separate Deed, appointing his Moveables to be disposed of, in the Way mentioned in the Trust-deed; the Reason of executing which Testament, appears from this Declaration contained in it, " declaring hereby, that if any Event shall happen, " whereby the foresaid Trust-disposition may be *liable to be quarrelled or reduced*, yet the same shall nevertheless stand and abide " in full Force, in so far as is herein referred to."

Nov. 20th,
1765.

" Of this Date, a few Days before his Death, he made another Deed, containing the following Alterations upon his Trust-settlement, first, that, upon the Failure of the Heirs-male of his Nieces, Sir *James Cockburn* of that Ilk, and the Heirs-male of his Body, should succeed preferably to Sir *James Cockburn* of *Langton*; and, 2dly, That, upon Failure of the Heirs-male of his Nephew and Nieces, the Trustees should pay 1000 *l. Sterling* to the Heirs whatsoever of said Nephew and Nieces.

The whole of these three Deeds bear to be subscribed in Presence of *Dr. Martin Eccles, Physician, and Mr. William Bell, Minister of the Gospel*; and they are all recorded on the 6th *December* 1765.

Mr. Scott, it would seem, has accepted of the Trust, and has uplifted some Rents, which the Pursuers have arrested in his Hands. The Pursuers were also advised, after having obtained the Decreet of Constitution above mentioned, to execute Letters of special Charge against *John Simpson*, charging him to enter Heir in special to the said *Thomas Cockburn*, his Uncle, in the Lands and others which belonged to *Mr. Cockburn*, upon which they raised a Summons of Adjudication, concluding to have the said Lands and heritable Subjects adjudged to them, in Payment of the foresaid Debt, together also with the Faculty of reducing the Disposition, executed by *Mr. Cockburn* on Death-bed, as above.

The Process of Adjudication having come in course before Lord *Kennet*, Compearance was made for *Mr. Walter Scott*, who produced the Trust-disposition in his favour, and insisted that the Right to the Lands being thereby vested in him, no Decreet of Adjudication could pass against him for any Debt due by *Simpson*. To this it was answered, that the Trust-disposition was reducible as on Death-bed,

Death-bed, for which Purpose the Pursuers were ready to repeat a Reduction, and that, in the mean time, it could do no Harm to the Trustee to allow a Decree, adjudging any Interest the Defender, *Simpson*, might have in these Lands.

Mr. *Scott* replied, that the Pursuers might, if they thought proper, adjudge any Faculty in the Defender to reduce the Trust-disposition, and he consented to their repeating the Reduction in this Process, but insisted, that, till the Trust-deed should be set aside, no Decree should go against the Lands.

The Lord Ordinary pronounced the following Interlocutor: January 23,
1769.
 “ The Lord Ordinary adjudges, in the Pursuers favours, any Faculty in the Defender, as apparent Heir, to set aside the Trust-disposition produced, and decerns and declares accordingly ;
 “ and, of Consent of Parties, allows the Pursuer to repeat a Reduction of said Disposition in this Process.”

The Pursuers then repeated their Reduction, calling for the foresaid Death-bed Deeds, executed by *Thomas Cockburn*, in order to their being reduced and set aside, so far as to the Prejudice of the Pursuers. And the Cause having again been called, of this February 9,
1770. Date, before the Lord Ordinary, Mr. *Scott*'s Council did not dispute, that the Deeds executed by Mr. *Cockburn* were liable to the Objection of Death-bed ; but he rested his Defence upon an alleged *Ratification* executed by *Simpson*, approving of the Death-bed Deeds, and which, he said, had been sent over to one *George Henderson*, as Mr. *Simpson*'s Attorney or Friend, to be delivered by him to the Trustee ; and though *Henderson* had not yet delivered it, yet, as it was in his Hands for that Purpose, Matters were to be considered in the same Light as if the Ratification were actually delivered, and in the Trustee's Hands.

The Pursuers answered, That supposing such Ratification to have been executed, the Creditors of *Simpson* could not be thereby prejudged, more especially, as it was still in his Attorney's Hands undelivered ; and there was Reason to believe, from *Simpson*'s Letters, that he did not mean to grant any such Ratification to the Prejudice of his Creditors.

The Lord Ordinary pronounced the following Interlocutor :
 “ Ordains the Pursuers to produce any Letters they have from Mr. *Simpson*, tending to show that he did not mean to execute a Ratification, or other Deed, by which the Pursuers should be debarred from affecting Mr. *Cockburn*'s Estate ; and, in respect the
B
“ Defenders

“ Defenders have already execute a Diligence against *Hender-
 “ derfon*, in whose Custody the Deed of Ratification is said to be,
 “ ordains the said *Henderfon* to depone how, or in what
 “ Manner he is possessed of the said Ratification, and to exhibit
 “ any Letters betwixt him and *Simpson* relative thereto.”

Mr. *Scott*, not choosng that *Henderfon* should depone in terms
 of this Interlocutor, prevailed with him to allow the Deed of Rati-
 fication and Power of Attorney, together with a Letter, which ac-
 companied these Papers, from Mr. *Simpson*, to be produced in Pro-
 cess, without executing the Diligence against him. The Deed of
 Ratification proceeds on the Narrative of the Trust-disposition ex-
 ecuted by Mr. *Thomas Cockburn*. “ And whereas, in the said Deed,
 “ it is provided and declared, that if the said *John Simpson*, or his
 “ Heirs, should ratify and approve of the said Trust-right, by a
 “ Deed under their Hand, then, and in that Case, he, the said
 “ *Thomas Cockburn*, did thereby appoint the acting Trustee for the
 “ Time, to discharge and give up, in favours of him or them, all
 “ Bonds, Bills, and other Documents of Debt due by the said
 “ *John Simpson* to the said *Thomas Cockburn* at the Time of his
 “ Death: Now, know all Men by these Presents, that the said
 “ *John Simpson*, in consideration of all and every of the saids Bonds,
 “ Bills, and other Documents of Debt due by the said *John Simp-
 “ son* to the said *Thomas Cockburn*, at the Time of his Death, be-
 “ ing duly discharged, cancelled, or delivered up to him, or his
 “ lawful Attorney, or Attorneys, authorized and impowered by
 “ him to ask, demand, and receive the same, and of his, the said
 “ *John Simpson*, his Heirs, Executors, and Administrators, being
 “ absolutely and effectually released and acquitted for ever there-
 “ from, doth declare his Approbation of the said Deed of Trust,
 “ and of all and every the Trusts, Dispositions, Articles, Matters,
 “ and Things therein contained, and doth hereby ratify, allow,
 “ and confirm the same, and all other Deeds, Writings, Disposi-
 “ tions, and Settlements whatsoever, duly made and executed by
 “ the said *Thomas Cockburn* in his Lifetime, subsequent to the said
 “ Deed of Trust-disposition. In witness whereof, &c.”

The Power of Attorney to Mr. *Henderfon*, after narrating the
 Settlement and Deed of Ratification, proceeds in these Words:
 “ Now, know all Men, by these Presents, that the said *John Simp-
 “ son* hath authorized, constituted, and appointed, and, by these
 “ Presents, doth authorize, constitute, and appoint, his trusty
 “ Friend,

" Friend, *George Henderson*, of *Edinburgh*, Writer to the Signet,
 " his true and lawful Attorney for him, and in his Name (upon
 " Tender of the said Deed-poll of the said *John Simpson*, herein
 " referred to) to ask, demand, and receive, of and from the law-
 " ful acting Trustee, or Trustees, under the said Deed of Trust-
 " disposition, all and every the said Bonds, Bills, and other Do-
 " cuments of Debt due by the said *John Simpson* to the said *Tho-*
 " *mas Cockburn*, at the Time of his Death; and, upon seeing the
 " same, and all and every one of them cancelled, and having the
 " same delivered up to him; and also, upon the said Attorney's
 " having and receiving from the said lawful acting Trustee, or
 " Trustees, absolute and effectual Releases, and Acquittances of
 " the said *John Simpson*, his Heirs, Executors, and Administra-
 " tors, for ever, against the said Bonds, Bills, and other Docu-
 " ments of Debt, (*and not before*) to deliver to the said lawful act-
 " ing Trustee, or Trustees, the said Deed-poll of Approbation
 " and Confirmation of the said *John Thomson*, herein before re-
 " ferred to, taking care the same be duly recorded: And the said
 " *John Simpson* doth hereby also authorize, constitute, and ap-
 " point the said *George Henderson* his true and lawful Attorney for
 " him, and in his Name, and to and for his Use and Benefit, to
 " ask, demand, recover, and receive, of and from all and every
 " Person, and Persons whomsoever, whom it doth, shall, or may
 " concern all and every such Sum and Sums of Money, Debts
 " and Demands whatsoever, which now are, or hereafter shall, or
 " may, become due and owing from any Person or Persons
 " whomsoever, upon any Account whatsoever, or by or through
 " any Manner of Ways or Means whatsoever, unto the said
 " *John Simpson*, particularly, of and from the said lawful acting
 " Trustee, or Trustees, or whomsoever else it doth, shall, or may
 " concern, all and every Sum and Sums of Money, Rents, Dues,
 " and Demands whatsoever, which now are, or which shall, at
 " any Time or Times hereafter, grow due, owing and payable to
 " him the said *John Simpson*, from the Estate of the said *Thomas*
 " *Cockburn*, by virtue of the said Deed of Trust-disposition, or
 " otherwise, howsoever: And, in Default of Payment thereof, or
 " of any Part thereof, to have, use, and take all lawful Ways and
 " Means, in the Name of the said *John Simpson*, or otherwise, for
 " the Recovery of the same; and, on Receipt thereof, Acquit-
 " tances, or other sufficient Discharges for the same, for, and in
 " the

“ the Name of the said *John Simpson*, to make, seal, and deliver,
 “ and to do all lawful Acts and Things whatsoever, concerning
 “ the Premises, as fully, in every respect, as he, the said *John*
 “ *Simpson* himself, might or could do, if he were personally pre-
 “ sent, and an Attorney, or Attorneys under him, for the Pur-
 “ poses aforesaid, to make at his pleasure, to revoke ; hereby rati-
 “ fying, allowing, and confirming, all and whatsoever his said
 “ Attorney shall, in his Name, lawfully do, or cause to be done,
 “ in and about the Premises, by virtue of these Presents. In wit-
 “ ness whereof, &c.”

These Papers bear Date 2d *February* 1767 ; and along with them
 was produced a Letter, bearing Date 28th *March* 1767, from Mr.
Simpson to Mr. *Henderson*, in these Words : “ Sir, Though a Stran-
 “ ger to you, I have, by the Recommendation of my Partner, Mr.
 “ *John Dunbar*, used the Freedom to trouble you with this Letter,
 “ begging, that you will peruse the Papers herewith sent, and that
 “ you will settle my Affairs with Mr. *Walter Scott* Writer to the
 “ Signet, Trustee appointed by the late Mr. *Thomas Cockburn*, my
 “ Uncle, and, by virtue of the Power herewith sent, get from him
 “ a Discharge of all Debts due by me to the Estate of said Mr.
 “ *Cockburn*, also all Letters from me to my Uncle; and what other
 “ Papers may be concerning me in Mr. *Scott*’s Possession, and to
 “ transmit the same to me as soon as you conveniently can. I
 “ should also be glad to have an exact State of Mr. *Cockburn*’s Af-
 “ fairs, at the Time of his Death, and to know what Sums of
 “ Money, by Bond, Note, open Account, Rents, &c. with Inte-
 “ rest thereon, might then be due to him, and how the same hath
 “ been disposed of. Your Acceptance of this Charge will much
 “ oblige me, as my Concerns, in this Country, will not, at pre-
 “ sent, permit my coming home. If it is inconvenient for you to
 “ do this Business, I shall esteem it a Favour if you will appoint
 “ another Person, that I may, as soon as possible, be made ac-
 “ quainted with the true State of these Affairs. I am, with re-
 “ gard, &c.”

Having made this Production, Mr. *Scott* insisted, that there was
 sufficient Evidence, from thence, of Mr. *Simpson*’s having ratified
 the Death-bed Deed. To which it was answered, on the Part of
 the Pursuers, that the Ratification never had been delivered, or, in
 any Shape, carried into Execution, as would have appeared, had
 Mr. *Henderson*, the Attorney, been examined upon the Diligence ;
 and

and they insisted, that this should still be done. The Lord Ordinary pronounced the following Interlocutor: " Ordains the said

Febr. 23,
1769.

" *Henderson* to depone upon the Way and Manner he came to be
" possessed of the said Deed of Ratification, and to produce all
" Letters betwixt him and Mr. *Simpson*, relative thereto, and grants
" Warrant for Letters of incident Diligence, at the Pursuers In-
" stance, for that Purpose, to the Day of "

Mr. *Henderson's* Oath is as follows: " Depones, that the Deed
" of Ratification marked by him, and the Lord Examiner, of
" this Date, as relative hereto, came to him, along with a Power
" of Attorney by Mr. *Simpson*, in the Deponent's favours, and that,
" at the same time, the Deponent received a Letter from Mr.
" *Simpson*, which he now exhibits, along with the said Power of
" Attorney, and which Letter and Power of Attorney are also
" marked by the Deponent and the Lord Examiner, of this
" Date, as relative hereto. Depones, That the Deponent *showed*
" the Ratification and Power of Attorney, with the above men-
" tioned Letter to Mr. *Walter Scott*; and after that Mr. *Scott* had
" had the same in his Possession for some Months, he returned
" these Papers to the Deponent, acquainting him, at the same
" time, *that he could not finish the Transaction*, in respect the Vouch-
" ers of the Debt due by Mr. *Simpson* were not in his, Mr. *Scott's*,
" Possession. Depones, That since the said Deed of Ratification
" was so returned to the Deponent by Mr. *Scott*, as above, the
" same was never out of the Deponent's Possession, till within
" these two Months, that the Deponent sent the same to Mr. *Scott*
" in a Letter: That the Deponent never accepted of the above
" Power of Attorney, or did any other Act in consequence there-
" of, than what is above deposed to, except getting from Mr.
" *Scott* an Inventory or State of Mr. *Cockburn's* Funds, a Copy
" whereof the Deponent transmitted to Mr. *Simpson*, and having
" wrote two Letters to Mr. *Simpson*, to which he never received
" any Answer: That the Deed of Ratification and Power of At-
" torney, aforesaid, were tacked together when the Deponent first
" received them as above, and a large Seal appended thereto, but
" that the Deponent separated the Ratification from the Power of
" Attorney, when he sent the Ratification to Mr. *Scott*, about two
" Months ago. Depones, That when the Ratification was first
" left with Mr. *Scott*, it was with an Intention that Mr. *Scott*
" might take a Copy thereof, and to have transacted with Mr.

“ Scott in terms of Mr. Simpson’s Letter, if Mr. Scott had been ready
 “ so to do, and that the Deponent did not understand it to be a de-
 “ livered Evident, until such Time as Mr. Scott should deliver up the
 “ Grounds of Debt due by Mr. Simpson, in terms of Mr. Simpson’s
 “ Instructions to the Deponent. *Causa scientie patet.* And this is
 “ Truth, &c.”

Since emitting this Oath, Mr. Scott has put into Process a new Deed of Ratification and Power of Attorney, of Date 30th August 1769, in the same Terms with the former, with this Difference only, that, in place of Mr. George Henderson, another Attorney is named, viz. Mr. Alexander Scott, Merchant in Edinburgh. This second Ratification, sent over *pendente processu*, and produced by the Attorney’s Permission in the same way with the former, without having been delivered to the Trustee, or, at least, without any Settlement between the Trustee and the Attorney, concerning the Debts which were due by Mr. Simpson to his Uncle’s Estate, can make no Difference upon the Question. The Reason of sending over this second Deed of Ratification and Power of Attorney to Mr. Alexander Scott, appears by the following Letter, wrote by Mr. Simpson to the Pursuer, Mr. Tyson, 30th August 1769, which at the same time shows that Mr. Simpson did not intend to ratify the Deed, so far as his Creditors might be thereby prejudged:

“ You are pleased to acquaint me of your having laid an Attach-
 “ ment against my Effects in Scotland; *this I have no Objection to,*
 “ nor can I blame you, for taking every Step in your Power, to se-
 “ cure the Debt of D. Y. and S. to Mr. Watson’s Estate. You will
 “ only please to observe, that I have never endeavoured to draw
 “ one Shilling from my late Uncle’s Estate, though I might have
 “ done it every Year; but my full Intent has ever been, and shall
 “ be, to do nothing that can make you, or any other Person, doubt
 “ my Inclination to finish my Concern with Mr. Watson’s Execu-
 “ tors as soon as possible.—In February 1767, I sent home a Power
 “ of Attorney to a Gentleman in Edinburgh to act for me; and,
 “ though I am certain he received it, yet have I never had a Scrape
 “ of a Pen from him; this has obliged me to send one to another
 “ Gentleman, in hopes that he may give me more Satisfaction. By
 “ the State of D. Y. and S’s Affairs, you will see my Presence in this
 “ Country is very necessary; and the more so, on account of Mr.
 “ Young’s poor State of Health. On the other hand, my own pri-
 “ vate Affairs makes my Presence in Scotland, for a few Weeks, almost
 indispensable

“ indispenſibly neceſſary ; but, without *your Conſent*, and Affurance
 “ that no Affront ſhall be offered me, on account of the Debt to
 “ *Mr. Watſon’s* Eſtate, it would be highly imprudent in me to come
 “ home.—Wherever I am, your Security is ſtill the ſame ; though,
 “ certainly, the ſettling my private Affairs to my Advantage muſt
 “ evidently ſtrengthen that Security. If, therefore, you ſhall ap-
 “ prove of my coming home, to look after theſe Affairs, which could
 “ not require my Abſence from this Country more than fix or ſeven
 “ Months, you will be kind enough to let me have your Answer
 “ as ſoon as poſſible. Nothing but my Anxiety to have done with
 “ the Affairs of *D. Y.* and *S.* could induce me to aſk Leave of you
 “ to come home ; for, as I am preſently circumſtanced, of all Parts
 “ of the Earth, *Britain* can give me leaſt Pleaſure ; and I am fully
 “ determined, never to leave this Province while I owe one Shilling
 “ to *Mr. Watſon’s* Eſtate, without your Conſent, however my pri-
 “ vate Intereſt may ſuffer thereby. I am, &c.”

At a Calling, of this Date, the Lord Ordinary made Avifandum March 2d,
 to your Lordſhips, and ordained Informations to be given in, the 1770.
 Parties to ſee and interchange, and the Informations to be in the
 Boxes againſt the 25th *April* : In Obedience to which, this is hum-
 bly offered upon the part of the Purſuers.

After ſo full a Deduction of the Facts, it will be unneceſſary to
 trouble your Lordſhips with much Argument. It has never yet
 been diſputed, that *Mr. Cockburn’s* Settlements, veſting his Eſtate in
 a ſort of perpetual Truſt, and allowing only the annual Profits to
 his Heir, were executed on Death-bed. Theſe Settlements, there-
 fore, being clearly prejudicial to his Heir, fall undoubtedly under
 the Law of Death-bed, and are reducible by *Mr. Simpson* ; unleſs
 in ſo far as he may have given up, or barred his Right, by any
 Deed of Ratification.

Neither has it been diſputed, that a Right of Reduction, com-
 petent to the Heir upon the Head of Death-bed, may be taken up,
 and made effectual by his Creditors. This indeed is a Point clearly
 eſtabliſhed in the Law, in ſo much that it has been found, by De-
 ciſions of your Lordſhips, that the apparent Heir’s perſonal Cre-
 ditors may reduce *ex capite leſti*, without Neceſſity of adjudging.
Stair, 16th February 1669, Creditors of *Balmerino* againſt *Lady Cupar*.
 In which Caſe the Court found, “ That the Creditors of *Balmerino*,
 “ as appearand Heir, had Intereſt to declare that their Debts
 “ might, by legal Diligences, affect the Eſtate of *Cupar*, unpre-
 “ judged

“ judged by this Disposition, as being made by *Cupar* on Death-bed, and that the Reduction, in so far as might contain such a Declarator, would be sustained.”

The Matter, therefore, being so far clear, the Question before your Lordships is, Whether the Reduction, otherwise competent to the Pursuers, as Creditors of *Simpson*, is barred by his supposed Ratification of the Death-bed Deed? The Pursuers do, with Submission, apprehend, that they are in no Shape barred; for the following Reasons:

In the *first* place, this Ratification, supposing it had been made effectual by Delivery, and by Implement of the Conditions under which it was granted, could not have stood in the way, because it is itself reducible, upon the Act 1621, as a gratuitous and unfair Deed, to the Prejudice of Creditors.

The Privilege of setting aside the Death-bed Deed, and of taking the Estate as Heir at Law, was a beneficial Right competent to *Simpson*, which he could not alienate gratuitously, to the Disappointment of his Creditors, any more than he could dispose of any other Subject or Right belonging to him.

This is a Point of which your Lordships will have no Doubt. The Author of the late Institute, B. 3d, Tit. 4th, § 44. in treating of Ratifications by the Heir, lays down the Doctrine in these Words: “ If the Heir renounce the Privilege, by signing Consenter to the Deed, or ratifying it in the Deceased’s Life, the Heir’s Creditors are barred from reducing, even on the Act 1621, the Debitor not having made over, or past from, any Right to their Prejudice, *viventis nulla hereditas*; but otherwise the Creditors, in the Heir’s Right, are entitled to reduce; and if the Heir ratifies the Deed, after the Succession opens to him, Reduction is competent to his Creditors, on the above Statute, and on the Head of Death-bed; in the same manner as if he had alienated the Estate himself, to their Prejudice; for, by ratifying the Death-bed Deed, he does the Equivalent.”

The Act 1621 is directed against “ all Alienations, Dispositions, Assignations, and Translations whatsoever, made by the Debitor, of any of his Lands, Tiends, Reversions, *Actions*, Debts, or Goods whatsoever, to any conjunct or confident Persons, without true, just, and necessary Causes, and without a just Price really paid, the same being done after the contracting of lawful Debts from true Creditors.” In terms of this Act, the Pursuers do

do subsume, that the Tendency of Mr. *Simpson's* Ratification is to alienate and make over to his Uncle's Trustee, a Right of Action competent to him to set aside the Death-bed Deed, and to take a beneficial Succession, as Heir at Law; without just, true, and necessary Causes, without a just Price really paid, and after having contracted those lawful Debts, for which his Creditors are now put to the Necessity of attaching this same Estate, and Right of Action competent to him; so that the pretended Ratification falls expressly under the Sanction of the Act 1621.

The only Answer made to this was, that the Alienation was not gratuitous, for that, in consideration of ratifying the Deed, the Trustee is appointed "to discharge and give up to him all Bonds, Bills, and other Documents of Debt, due by the said *John Simpson* to the said *Thomas Cockburn* at the Time of his Death."

But it will readily occur, that this Clause in the Deed can at no rate support the Ratification, any further than to the Extent of the onerous Cause itself, *i. e.* to the Extent of the Value of those Bonds and Bills, which are thus to be given up. The Ratification is merely gratuitous, *quoad ultra*, and consequently still falls under the Act 1621.

At the same time it is submitted to your Lordships, that the giving a Part of the Succession, in order to validate the Alienation of the rest, cannot, with any Propriety, be considered as an onerous Cause, even to the Extent of the Part thus given. Mr. *Simpson* was Heir-at-law to his Uncle, and fell naturally to succeed to the whole, unincumbered with any Trust-rights or Conditions, and therefore when his Uncle gives him a Part, under Condition that he ratifies the Trust as to another Part, this is an indirect Attempt to elude the Law of Death-bed. Mr. *Simpson's* taking those Bonds and Bills, which he would have succeeded to in the natural Course of Law, can be no Reason why he should not also take the whole other Estate, to which he is Heir, and why he should not free it from the Fetters of a Death-bed Deed, which is not good in Law against him.

But, 2dly, With regard to this Deed of Ratification, another conclusive Objection lies against it, in so far as obtruded against the Creditors, *viz.* that it never has been delivered nor carried into execution, at least, that it was not delivered, or the Transaction completed, before the Matter was rendered litigious by the

present Process. Mr. *Henderson's* Oath, compared with the Power of Attorney and Letter to him, explains fully how this Matter stands. Mr. *Simpson*, it is true, signed such a Deed, but he never delivered it to Mr. *Scott*, the Trustee. He sent it over to his own Attorney or Agent, with Instructions to transact Matters with Mr. *Scott*, and not to deliver the Ratification, till he got up the Bonds, Bills, and Documents, which he was to receive on the other hand from the Trustee.

This Transaction never was completed. Some Conference only passed upon the Subject, and Mr. *Scott* took a Copy of the Ratification, but Matters remained *in statu quo* at the Commencement of this Process; and Mr. *Henderson* expressly depones, that he did not consider the Ratification to be a delivered Evident. It remained in the Hands of Mr. *Henderson*, till it became necessary to recover it from him, in order to be produced; and Mr. *Scott* being desirous of avoiding his Examination upon the Diligence, for obvious Reasons, he was then prevailed on to part with it voluntarily, in order to be produced in Process; but the real State of the Fact came afterwards out upon his Oath, in the Way above mentioned.

The Ratification was clearly a Deed of that kind, which required Delivery, in order to make it effectual, and it is impossible to maintain, that a Deed is delivered, while it remains in the Hands of the Granter or of his Agent. Mr. *Henderson* is to be considered in the same Light with Mr. *Simpson* himself. The Deed was in his Hands, not for Behoof of Mr. *Scott*, the Trustee, but for Behoof of his Constituent, Mr. *Simpson*; and indeed he had Orders from his Constituent, in general, to transact Matters with Mr. *Scott*, and not to part with the Deed, till they were so transacted, and till the Bonds and Bills, &c. were delivered up, which never happened. A Transaction may have been intended, and may have been the Subject of Communing, but in fact none was ever executed.

In a Case observed by *Durie*, 16th December 1626, *Byres contra Johnston*, it was found, that a Disposition having been delivered by the Seller to a Writer, in order to draw a Charter in favour of the Purchaser, there was still *locus penitentiae*, because the employing a Writer in this Manner, and putting the Disposition into his Hand, was not the same, as if Delivery had been made to the Purchaser himself. In the present Case, there can be still less Doubt, because
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the Letter and Power of Attorney do expressly shew upon what Terms, and for what Purposes the Ratification was sent over to Mr. *Henderson*, as Attorney for *Simpson*. It was still in the Power of *Simpson* to recal the Letter of Attorney granted to *Henderson*, and to take the Ratification out of his Hands, and destroy it if he thought proper, at any Time before compleating the Transaction, and delivering the Deed to Mr. *Scott*. In fact, he afterwards recal-
led *Henderson's* Power of Attorney, and granted a new one to Mr. *Alexander Scott*, as already mentioned.

As to this new Power of Attorney and Ratification, which has likewise been produced in Process, no Argument arises from it in favour of the Trustee. It never made its Appearance till the Pursuers were in *curfu diligentiae*, and therefore can be no Bar to the just Right which the Creditors have acquired of setting aside this Death-bed Deed, more especially, as it is not pretended, that, even at this Day, any Step has been taken towards implementing the Conditions, under which alone the Ratification was to be granted, viz. the delivering up the Bonds and Bills, &c.

Lastly, from Mr. *Simpson's* Letter to Mr. *Tyson*, of Date 30th August 1769 above recited, your Lordships see plainly, that he never meant to hurt the Right of the Pursuers, in operating Payment of the Debt due to the Estate of Mr. *Watson*; on the contrary, he says he has no Objection to the Pursuers attaching his Effects in *Scotland*, and taking every Step possible to secure said Debt; he therefore, in effect, agrees, that the Ratification shall not be used or made effectual, so far as prejudicial to the Pursuers Interest; and upon the Faith and Supposition, that Mr. *Simpson* was to do nothing whereby the Pursuers Interest was to be hurt, Mr. *Tyson* complied with the Request signified in that Letter, of allowing Mr. *Simpson* to come home, without doing personal Diligence against him.

In these Circumstances, the Pursuers cannot, with Submission, think that Mr. *Simpson* could mean to act so unfair a Part, as either by himself or by his Attorney, to take any Step for making the Ratification effectual, so as to bar their Diligence. Neither indeed does he give any Authority to Mr. *Scott*, the Trustee, or to any other Person to appear or make Defences for him in this Process. The Defence is carried on solely by Mr. *Walter Scott*, the Trustee, not for Behoof of Mr. *Simpson*, but for Behoof of the substitute Heirs, whose Advantage it may be, that the Fee of the Estate should

should not be affected by the Creditors of Mr. *Simpson*: But this is an Interest which your Lordships will not incline much to favour, in opposition to just and lawful Creditors, whose Loss will be very considerable, if it cannot be made effectual out of this Estate, which does by Law pertain to their Debitor.

Upon the whole, it is hoped your Lordships will have no Difficulty of finding that the Pursuers are intitled to set aside the Death-bed Deed, and to adjudge the Fee of the Estate, and that the pretended Ratification by *Simpson* cannot stand in the Way, either of the Reduction or of the Adjudication.

In respect whereof, &c.

ILAY CAMPBELL.

